85-2076

Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1985

BERNARDO RODRIGUEZ,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Fourth Amendment mandates the suppression of evidence found, during a search pursuant to an arrest warrant, in an area to which the searching authorities had no reasonable belief the suspect had access?

II.

Whether there is a violation of 18 U.S.C. Section 922(a)(6), which prohibits knowingly making a false statement in the purchase of a firearm, when the purchaser had a reasonable belief in the truthfulness of his statement and had no intent to deceive?

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OPINION BELOW

As to the Fourth Amendment issue, the District Court's oral findings of fact and ruling are set forth in the Appendix to this Petition.

The Eleventh Circuit Court of Appeals affirmed a judgment of the United States District Court for the Southern District of Florida finding petitioner guilty of making false statements in violation of 18 U.S.C. Section 922(a)(6) in an unpublished opinion which reads in full:

PER CURIAM: AFFIRMED. See Cir. R. 25.

Rehearing of this judgment was denied per curiam. See Appendix.

JURISDICTIONAL STATEMENT

On January 8, 1986, the Eleventh Circuit Court of Appeals affirmed petitioner's convictions of firearms violations. Rehearing of that decision was denied on February 20, 1986.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C.A. Section 1254(1) (1966).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Petitioner's first question for review involves the Fourth Amendment, which in pertinent part provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . .

U.S. Const. Amend. IV.

The second issue presented involves 18 U.S.C. Section 922(a)(6), which provides:

> (a) It shall be unlawful-
> (6) for any person in connection with the acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C.A. Section 922(a)(6) (1976).

STATEMENT OF THE CASE

On January 30, 1984, a warrant for the arrest of petitioner was issued upon a complaint charging him with a violation of U.S.C. Section 922(a)(6). Consequently, on February 4, 1984, Special Agent Dennis Hamburger of the United States Bureau of Alcohol, Tobacco and Firearms went to an address believed to be that of petitioner in an attempt to serve the arrest warrant.

Upon approaching the front of the subject premises, Agent Hamburger recognized a known fugitive who was then exiting the front gate. Agent Hamburger proceeded to arrest the fugitive, who informed him that petitioner was inside the premises. Therefore, while remaining outside the front of the premises, the front and side of which remained in full view, Agent Hamburger called for backup assistance. When additional agents arrived, a search was conducted of the premises, although petitioner was not found within.

Petitioner moved to suppress certain firearms which were found within an exterior attic crawl space of the premises. At a hearing on the motion to suppress, the uncontroverted testimony of the agents who seized the firearms established that the firearms were found in an area which, according to their belief as to petitioner's location, he could not have entered without their seeing him. Specifically, the testimony established that the agents were told that petitioner was inside the premises, which was under continual surveillance of the front and side from the time the first agent arrived until the end of the search. Yet, the officers saw fit to search an attic crawl space on the side of the premises which

they had determined could only be entered from the outside of the premises.

Thus, the evidence established that the area in which the weapons were found could not have been entered by petitioner without his being seen by the surveilling officers.

Additionally, testimony established that the description of petitioner which had been circulated to law enforcement officers stated that petitioner was five feet, nine inches tall and weighed 200 pounds. The entrance to the crawl space was fourteen inches wide and seventeen and one-half inches high, and located approximately ten to twelve feet from the ground. Thus, the only possible means of access other than by ladder was by climbing up to and then standing on a flimsy two-inch conduit pipe running four or five feet below the crawl space, and from that position pulling himself vertically up the side of the house and through the entrance to the crawl space. The agents failed to explain how they believed a stocky, 200 pound man could have accomplished this in full view of the surveillance teams and yet not be noticed.

Petitioner argued in his motion to suppress that the searching officers could therefore not have reasonably or even subjectively believed that petitioner was hiding in the attic crawl space, and therefore a search warrant should and could have been obtained prior to any search of this area. Nonetheless, the District Court refused to suppress the firearms found in the crawl space.

Petitioner was tried for, *inter alia*, knowingly making false statements in obtaining firearms by representing that he was not a convicted felon. Testimony at trial established that petitioner's attorney during an earlier, state court criminal proceeding had advised petitioner that by accepting a negotiated plea, petitioner could say he was not a convicted felon. The attorney further testified that he believed the state judge had told petitioner he could always say he had never been convicted. The government presented no evidence that petitioner did not, therefore, honestly believe he was not a convicted felon.[1]

Because of this honest belief in the truth of his statement, petitioner sought acquittal of the Section 922(a)(6) charges, arguing that he did not "knowingly" make a false statement and did not have the requisite intent to deceive. This issue was, however, sent to the jury, and petitioner was found guilty of knowingly making a false statement.

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[1]Petitioner concedes, *arguendo*, that he was in fact a convicted felon for purposes of firearms disabilities under this Court's holding in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).

STATEMENT OF FEDERAL JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over this case pursuant to 18 U.S.C.A. Section 3231 (1985).

ARGUMENT

The weapons seized in the exterior attic crawl space should have been suppressed.

This issue raises the question of the permissible scope of a search pursuant to an *arrest* warrant. The general principle is well established that a search for an individual pursuant to an arrest warrant may be only:

> as broad as may reasonably be necessary to prevent the dangers that the suspect at large may resist or escape.

Warden v. Hayden, 387 U.S. 294, 299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782, 787 (1967). Thus, in that case this Court pragmatically held that since a suspect was at large in a house, it was reasonable for a police officer to search for weapons in a washing machine in that house since the at-large suspect could conceivably have retrieved a weapon from the machine and used it to resist arrest. *See id.* at 299-300 and n.5, 87 S.Ct. at 1646 and n.5, 18 L.Ed.2d at 788 and n.5.

Here, however, there was no such element of reasonableness for the search. The very premise of the Fourth Amendment was disregarded. As reviewed in the statement of the case, *supra* this Petition, the facts

surrounding the search of the attic crawl space were such that the agents could not have reasonably believed it necessary to conduct that search within the limits set forth in *Warden v. Hayden.* To suggest that petitioner might have climbed onto a two-inch pipe, from there dragged himself four or five feet up the exterior of a building, and then pulled his hefty body through a tiny aperture—all the while unseen by the continuously-surveilling officers—is to suggest the absurd.

The search of the attic crawl space was constitutionally infirm; a warrant to search should have been obtained. Petitioner thus urges that a writ of certiorari issue to review the Eleventh Circuit's order affirming his conviction on the charges resulting from the seizure of firearms from that area.

18 U.S.C. Section 922(a)(6) is a section of the comprehensive firearms control provisions of the United States Code disabling certain individuals from obtaining weapons. Some firearms control sections create strict liability crimes requiring no mental culpability for violation. *See United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971). Section 922(a)(6) specifically provides, however, that in order for culpability to attach under its provisions, the accused must have "knowingly" made a false statement which is "intended or likely to deceive" a firearms dealer. Despite this clear language, however, petitioner was convicted of violating Section 922(a)(6) although he believed he was not a convicted felon. This result places the Eleventh Circuit's position as to the requisite knowledge squarely in conflict with at least five other federal circuit courts

of appeals, as well as with the former Fifth Circuit.[2] Certiorari should, therefore, be granted in order to resolve this conflict. *See United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963).

Specific intent to violate the law is not an element to be proven to establish a violation of Section 922(a)(6). *E.g., United States v. Cornett*, 484 F.2d 1365, 1368 (6th Cir. 1973); *United States v. Beebe*, 467 F.2d 222, 226 (10th Cir. 1972), *cert. denied*, 416 U.S. 904, 94 S.Ct. 1607, 40 L.Ed.2d 108 (1974). Thus, ignorance of the law is no defense to a charge of violating section 922(a)(6). *See, e.g., United States v. Squires*, 440 F.2d 859 (2d Cir. 1971).

Ignorance of the *facts*, however, constitutes a defense to violating this section, as the majority of federal circuits have held knowledge that the facts asserted are false plus an intent to deceive to be elements of proof of Section 922(a)(6). *United States v. Schmitt*, 748 F.2d 249, 253 (5th Cir. 1984); *United States v. Cochran*, 546 F.2d 27, 29 (5th Cir. 1977); *United States v. Behenna*, 552 F.2d 573, 575 (4th Cir. 1977); *Cody v. United States*, 460 F.2d 34, 38 (8th Cir.), *cert. denied*, 409 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) ("crucial question" is accused's understanding "of the facts, not the law"); *United States v. Beebe, supra*, 467 F.2d at 226 (10th Cir.); *United States v. Squires, supra*, 440 F.2d at 864 (2d Cir.); *see United States v. Renner*, 496 F.2d 922 (6th Cir. 1974).

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[2]The Eleventh Circuit has adopted as controlling precedent the decisions of the former Fifth Circuit prior to October 1, 1981. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

In this case, petitioner has been convicted despite his ignorance of the facts: he had no knowledge that he was making a false statement, and certainly, therefore, no intent to deceive. The grant of this Petition for Certiorari will enable this Court to review this resulting disparity between the law in the Eleventh Circuit and that of nearly every other appellate circuit.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY certify that a true copy of this Petition was mailed to the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33156, and that 3 true copies were mailed to the United States Solicitor General, Department of Justice, Room 5614, Washington, D.C. 20530, this 7th day of May 1986.

BY: _____